



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**PETITION NO. 47 OF 2019**

**IN THE MATTER OF ARTICLE 22(1)**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS OR FUNDAMENTAL FREEDOMS UNDER ARTICLES 2(1) & (4), 3, 10, 19(1) & (2), 20(1), 21(1), 22(2), 27(1), 28, 35, 47(1), 48, 73(2) AND 259(1) OF THE CONSTITUTION OF KENYA**

**BETWEEN**

**OKIYA OMTATAH OKOITI.....PETITIONER**

**VERSUS**

**CABINET SECRETARY, MINISTRY OF EDUCATION,**

**SCIENCE AND TECHNOLOGY.....1<sup>st</sup> RESPONDENT**

**HON ATTORNEY GENERAL.....2<sup>nd</sup> RESPONDENT**

**AND**

**COUNCIL OF UNIVERSITY OF**

**NAIROBI.....1<sup>st</sup> INTERESTED PARTY**

**PROF. WILLIAM OGARA.....2<sup>nd</sup> INTERESTED PARTY**

**PROF. JAMA A. MOHAMUD.....3<sup>rd</sup> INTERESTED PARTY**

**PROF. LYDIA W. NJENGA.....4<sup>th</sup> INTERESTED PARTY**

**PROF. JULIUS A. OGENGO.....5<sup>th</sup> INTERESTED PARTY**

**PROF. MADARA OGOT.....6<sup>th</sup> INTERESTED PARTY**

**PROF. ISAAC MBECHÉ.....7<sup>th</sup> INTERESTED PARTY**

**PROF. STEPHEN G. KIAMA.....8<sup>th</sup> INTERESTED PARTY**

**JUDGMENT**

1. Okiya Omtatah Okoiti (Petitioner) moved the Court alleging that the decision by the Cabinet Secretary, Ministry of Education (1<sup>st</sup> Respondent) on 15 January 2019 to appoint the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Interested Parties to the positions of Deputy Vice-Chancellors of the University of Nairobi while not recommended by the Council of the University of Nairobi (1<sup>st</sup> Interested Party) were contrary to the national values (article 10), equality before the law (Article 27), access to information (Article 35), fair administrative action (Article 47) and responsibilities of leadership (Article 73).

2. The Petitioner also contended that the decision by the 1<sup>st</sup> Respondent was discriminatory, an abuse of power and violated the relevant

provisions of the Universities Act, 2012.

3. The Petition was filed together with a motion seeking orders staying the decision of the 1<sup>st</sup> Respondent but on 28 February 2019, the Court directed that in lieu of hearing the application, the hearing of the Petition be accelerated.
4. Consequently, the Court directed the Respondents and Interested Parties to file and serve their responses to the Petition before 15 March 2019.
5. When the parties appeared in Court on 15 March 2019, the Respondents confirmed having filed and served a replying affidavit.
6. At the same session, the Petitioner sought for leave to file a further affidavit and the Court granted him leave to file and serve a further affidavit, and submissions before 3 April 2019. The Respondents and Interested Parties were directed to file and serve submissions before 10 April 2019.
7. The Court directed that the submissions be highlighted on 3 June 2019.
8. The Petitioner only filed his submissions on 31 May 2019 and therefore the highlighting could not proceed on 3 June 2019 as the Respondents sought for more time to file their submissions.
9. The Respondents filed their submissions on 10 June 2019 and highlighting was taken on 8 July 2019.
10. The Court has considered all the material placed on the record including the List of Authorities (Interested Parties did not participate in the proceedings despite service) and condensed the Issues for determination into 2, whether the Petitioner had *locus standi* and whether the 1<sup>st</sup> Respondent acted *ultra vires*.

## **Background**

11. On 10 January 2019, the 1<sup>st</sup> Interested Party wrote to the 1<sup>st</sup> Respondent recommending that the 5<sup>th</sup> Interested Party be appointed as Deputy Vice-Chancellor, Academic Affairs; 6<sup>th</sup> Interested Party be appointed as Deputy Vice-Chancellor for Research, Production and Extension; the 7<sup>th</sup> Interested Party, Deputy Vice-Chancellor for Finance, Planning and Development, and the 8<sup>th</sup> Interested Party as Deputy Vice-Chancellor, Human Resource and Administration.
12. In the aforesaid recommendation, the 1<sup>st</sup> Interested Party outlined an order of merit (ranking of performance) of the 3 top interviewees for each of the positions, and also drew the attention of the 1<sup>st</sup> Respondent to section 35(1)(a)(v) of the Universities Act, 2012.
13. Upon receipt of the recommendations, the 1<sup>st</sup> Respondent held a meeting on 14 January 2019 with the Ministry's Chief Administrative Secretary/Principal Secretary in charge of University Education, the Chancellor of the University of Nairobi, the Chair of the 1<sup>st</sup> Interested Party, and the Vice-Chancellor of the University of Nairobi.
14. At the meeting, the 1<sup>st</sup> Respondent requested to be furnished with the *curriculum vitae* of top 3 candidates for each position.
15. Upon receipt of the *curriculum vitae*, the 1<sup>st</sup> Respondent constituted a *Tenure Review Committee* which met on 15 January 2019 to consider/review the proposed appointments.
16. The *Tenure Review Committee* on its part recommended to the 1<sup>st</sup> Respondent that the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Interested Parties be appointed as Deputy Vice-Chancellors for Human Resource and Administration; Finance Planning and Development; Research, Production and Extension and Academic Affairs respectively.
17. On the same day, the 1<sup>st</sup> Respondent wrote directly and severally to the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Interested Parties notifying them of their appointments as Deputy Vice-Chancellors.
18. The 1<sup>st</sup> Interested Party got wind of the appointments and caused a meeting to be held on 24 January 2019 to discuss the appointments.
19. The 1<sup>st</sup> Interested Party noted that except for the position of Deputy Vice-Chancellor, Academic Affairs (5<sup>th</sup> Interested Party), all the other appointees were not those it recommended.
20. The 1<sup>st</sup> Interested Party took the view that the appointments were in violation of section 35(1)(v) of the Universities Act, 2012.
21. Consequently, the 1<sup>st</sup> Respondent resolved not to issue formal contracts to the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Interested Parties and sought that the 1<sup>st</sup> Respondent withdraw the appointments.
22. The Chair of the 1<sup>st</sup> Interested Party therefore communicated its reservations to the 1<sup>st</sup> Respondent on the same day and sought for a meeting. Another letter was directed to the Attorney General (2<sup>nd</sup> Respondent) seeking his legal opinion.

23. The 2<sup>nd</sup> Respondent replied to the 1<sup>st</sup> Interested Party's letter on 28 January 2019, seeking for time to get views from the 1<sup>st</sup> Respondent before giving its legal opinion.

24. The opinion did not come, nor did the 1<sup>st</sup> Respondent grant the 1<sup>st</sup> Interested Party's request for a meeting, and on 20 February 2019, these legal proceedings were instituted.

### ***Locus standi***

25. The Respondents contested the Petitioner's *locus standi* to institute the legal proceedings.

26. In the view of the Respondents, the Petition did not demonstrate any public interest because the persons affected by the decision of the 1<sup>st</sup> Respondent were the Interested Parties. The dispute, it was urged fell within the arena of private law.

27. Article 22(1) & (2) of the Constitution has expanded the doctrine of *locus standi* beyond the traditional understanding of the concept, more so where there are allegations of violations of constitutional rights and freedoms.

28. The office of a Deputy Vice-Chancellor is a *public office* and the holder thereof a *public officer*. Chapter 13 of the Constitution has elaborately set out the values and principles of *public service* and these include fair competition and merit in appointments, adequate and equal opportunities in appointments and promotions and representation of Kenya's diverse communities.

29. Good governance, integrity, transparency and accountability are national values which equally imbue the *public service*.

30. The 1<sup>st</sup> Respondent holds a *state and public office* and is bound to consider the national values and principles and the values and principles guiding recruitment into the *public service*.

31. The Petitioner contended that the 1<sup>st</sup> Respondent, the Cabinet Secretary for Education appointed to *public office* as Deputy Vice-Chancellors persons who were not recommended by the Council of the University of Nairobi, a function given to the Council by statute.

32. Transparency and accountability in recruitment in the *public service* has constitutional underpinnings. The offices given roles to play in such recruitment are bound by the national values, principles as well as principles guiding the *public service*.

33. In the view of the Court, the questions posed in these proceedings which implicate recruitment to the higher echelons of public universities are well within the sphere of public interest, and transcend the private law interests of the Interested Parties.

34. The Court is therefore of the view that the Petitioner as well as the Petition herein meets the threshold contemplated by Articles 22 and 258 of the Constitution.

### **Whether 1<sup>st</sup> Respondent abused her office/acted *ultra vires***

35. Issues 2 and 3 as identified by the parties spoke to the general question whether the 1<sup>st</sup> Respondent had any discretion to reject the recommendations of the 1<sup>st</sup> Interested Party.

36. In attempting to explain why she did not *comply* with the recommendations of the 1<sup>st</sup> Interested Party, the 1<sup>st</sup> Respondent asserted in her replying affidavit that she was cognisant of the national values and principles which require representation of the face of Kenya, gender non-discrimination, inclusiveness, equity, protection of the marginalised in implementing public policy, and that she therefore sought for an evaluation of the recommendations by a *Ministerial Tenure Review Committee* before making the appointments.

37. According to the 1<sup>st</sup> Respondent, she acted lawfully when making the appointments. She also drew the attention of the Court to a *Circular* referenced *Delegation of Public Service Commission Human Resource Powers and Functions and Guidelines on Terms and Conditions of Service for State Corporations' Chief Executive Officers, Chairmen and Board Members, Management Staff and Unionisable Staff*.

38. The powers and limits thereof of the Cabinet Secretary for Education in the appointment of Vice-Chancellors and Deputy Vice-Chancellors for public universities under the Universities Act, 2012 are not novel.

39. Those powers have been applied and interpreted by the High Court in *R v Cabinet Secretary, Ministry of Education, Science and Technology & 3 Ors ex parte Njomo John* (2017) eKLR and in *Josphat K.Z. Mwatelah v Technical University of Mombasa Council & 2 Ors* (2017) eKLR.

40. In both decisions, the Courts considered the provisions of section 39(1)(a) of the Universities Act (similar to section 35 now under consideration) and section 51 of the Interpretation and General Provisions Act, and concluded that the Cabinet Secretary, Ministry of Education lacked the power to appoint a Vice-Chancellor without a *recommendation to appoint*.

41. The 1<sup>st</sup> Interested Party's letter of recommendation and dated 10 January 2019 was express that

AS provided for in the Act and having duly completed the competitive recruitment process for the various positions of Deputy Vice

Chancellors (DVC), the Council now conveys its resolutions recommending the ***best candidates for appointment to the respective DVC positions.*** (my emphasis).

42. The best candidates were the 5<sup>th</sup> Interested Party as Deputy Vice-Chancellor for Academic Affairs; 6<sup>th</sup> Interested Party as Deputy Vice-Chancellor for Research, Production and Extension; 7<sup>th</sup> Interested Party as Deputy Vice-Chancellor, Finance, Planning and Development, and 8<sup>th</sup> Interested Party as Deputy Vice-Chancellor Human Resource and Administration.

43. The 1<sup>st</sup> Respondent did not approve of the recommendations and opted to appoint the 2<sup>nd</sup> to 4<sup>th</sup> Interested Parties. These persons were not recommended by the 1<sup>st</sup> Interested Party.

44. In the view of the Court, it was not lawful for the 1<sup>st</sup> Respondent to go beyond the list of the recommended persons or even to consider those not recommended even if they participated in the interviews.

45. In going beyond the recommendations of the 1<sup>st</sup> Interested Party, the Court is of the view that the 1<sup>st</sup> Respondent acted *ultra vires*.

46. According to the Court, the most which was expected of the 1<sup>st</sup> Respondent was to make her reservations with the reasons thereto known to the 1<sup>st</sup> Interested Party, and request for reconsideration, if at all.

47. Another option which was open to the Cabinet Secretary was to seek a legal interpretation from an appropriate adjudicative body, if she felt that the values and principles underpinning public service recruitment were violated by the 1<sup>st</sup> Interested Party in making the recommendations.

48. In this Court's view, an office given the function or mandate to formally appoint on recommendation of another person has an obligation to seek the intervention of the Courts when it strongly believes or has reasons to demonstrate that the recommendations or recommended persons did not meet some Constitutional requirement.

49. It is regrettable that the 1<sup>st</sup> Respondent snubbed the request from the 1<sup>st</sup> Interested Party for consultations after it raised its concerns about the lawfulness of her decision.

50. Before concluding, one observation.

51. The Court has looked at the Circular on *Delegation* relied on by the Respondents. If at all it applied to the recommendations from the 1<sup>st</sup> Interested Party, the 1<sup>st</sup> Respondent as an *Authorised Officer*, should have utilised the provision in clause 4.3 thereof after declining to approve the recommendations, and to refer the list back to the 1<sup>st</sup> Interested Party

52. The Circular, in the view of the Court, could not assist the Respondents case as urged.

### **Conclusion and Orders**

53. From the foregoing, the Court finds and holds that the Petitioner has satisfied the burden of proving his case to the required standard, and the Court issues orders in the following terms

(i) A declaration do and is hereby issued that the actions of the 1<sup>st</sup> Respondent in not acting on the recommendations of the 1<sup>st</sup> Interested Party violated the Constitution and are null and void.

(ii) An order of certiorari is hereby granted bringing into Court and quashing the 1<sup>st</sup> Respondent's letters referenced REF: MHEST/CONF/2/1/VOL. 115 and dated January 15<sup>th</sup>, 2019 purportedly appointing the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Interested Parties to various Deputy Vice-Chancellor positions at the University of Nairobi.

(iii) An order of mandamus is hereby issued directing and compelling the 1<sup>st</sup> Respondent to issue appointment letters to the individuals recommended for appointment by the 1<sup>st</sup> Interested Party and who emerged top with the highest marks in the competitive interview process to fill various Deputy Vice-Chancellor positions at the University of Nairobi.

54. There have been previous proceedings involving the 1<sup>st</sup> Respondent where similar legal issues were raised and determined but the same appear not to have served as a beacon.

55. The 1<sup>st</sup> Respondent to pay the Petitioner costs on half scale.

**Delivered, dated and signed in Nairobi on this 7<sup>th</sup> day of October 2019.**

**Radido Stephen**

**Judge**

**Appearances**

For Petitioner                      Mr. Odongo instructed by Chiggai, Alakonya, Lusigi & Odongo LLP Advocates

For Respondents                  Ms. Wangeci, State Counsel, Office of the Hon. Attorney General

Court Assistant                    Lindsey